DOCKET NO. 82-2161

In the Supreme Court of the United States

October Term, 1982

FRED HICKS, JR.,
Petitioner

v.

APEX MARINE CORPORATION
Respondent

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION FOR COSTS UNDER RULE 49.2

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QUESTION PRESENTED

The Petitioner frames the question presented in terms of a violation of the Seventh Amendment of the Constitution. At no time below did the Petitioner allege that the Seventh Amendment was involved in this case. (1a-11a). Hence, the Respondent is dissatisfied with how the Petitioner presents the issue and asserts that in truth there is no question for this Court to review.

STATEMENT OF THE CASE

Hicks was a merchant seaman who brought suit for damages and maintenance and cure as a result of personal injuries sustained on board the Respondent's vessel on October 18, 1980. The causes of action are based on the Jones Act, 46 U.S.C. Section 688 et. seq. and the general maritime law. The defendant denied that the plaintiff ever sustained an injury.

The case came on for trial with a jury on June 16-17, 1982, in Norfolk, Virginia, Judge Robert Doumar presiding. Hicks testified that on October 18, 1980, he fell backwards off a ship's ladder about nine feet landing on his head and back on the steel deck without breaking any skin. The plaintiff weighs 220 pounds.

Hicks claimed he suffered a concussion and the reason he got no immediate medical treatment was because of the delayed reaction of its effects. The issue therefore was whether a true brain concussion causes immediate or delayed pain.[1] Dr. Eugene Ford, a physician associated with the Marine Hospital saw Hicks in July, 1981, nine (9) months after the accident. Hicks was then complaining of headaches, dizziness, blurred vision, and pain in his knees. Dr. Ford supported the seaman's position. During the course of the court's examination of Dr. Ford, Petitioner's counsel stated he wished to make a "motion" out of the hearing of the jury. Thereafter, although no mistrial motion was made, the court and counsel exchanged views as to the propriety of the court's questions, resulting in Judge

1 Apex contended that if he really fell as claimed his head would have hurt immediately and he would have required treatment, at least first aid. Hicks contended that some concussions do not manifest themselves until months later.

Doumar saying that he was going to ask one more question: What symptoms normally follow a concussion? He then asked counsel for Hicks "Would this clear up the problem, Mr. Radin?" The response was "Yes, sir." The question was then asked and answered. No objection was made.

The next witness was Dr. Armistead Williams who examined Hicks at his attorney's request. He opined that because of the course of symptoms related by Hicks, he doubted his problem was purely post-traumatic syndrome.

Thereafter the jury retired for the day and Hicks' counsel moved for a mistrial based on the court's questioning of Dr. Williams. Judge Doumar denied the mistrial and offered to call Dr. Williams back to the stand for further questioning by Petitioner's counsel or to instruct the jury in any appropriate fashion. These offers were declined. (10a). Nevertheless, the following morning the court sua sponte admonished the jury to use its own judgment and not be influenced by statements of the court. (3a).

After closing argument the jury was asked inter alia the following special interrogatory:

"Did the plaintiff sustain an accident and injury on October 18, 1980, as alleged?

"If No, you may return to the courtroom.

After deliberating about fifty minutes the jury answered the first question "No" and returned to the courtroom. (4a-5a).

Hicks filed a motion for a new trial pursuant to Rule 59 which was denied in a decision and order of July 13, 1982. (6a-11a).

A Notice of Appeal was filed on July 21, 1982, argument was conducted on February 10, 1983, and the Fourth Circuit affirmed in a per curiam opinion dated March 14, 1983. (1a-3a).

ARGUMENT

HICKS' PETITION DOES NOT FIT WITHIN THE GUIDELINES OF RULE 17

The Petition for Certiorari makes no effort to present special and important reasons for obtaining a writ nor does it fall within the criteria of Rule 17.

The only issue presented "concerns the conduct of the Trial Court in questioning the witness" (Petition p. 6-7). This alone is not subject matter for Supreme Court review, and no special or compelling circumstances are cited. The Petitioner's argument is merely a rehash of the arguments made in the district court and in the circuit court.

It is argued here (Petition p. 15) that the trial judge deprived Hicks of his Constitutional right to trial by jury.[2] No cases are cited that support this bold proposition. If this were so here--assuming the trial court overstepped its bounds--it would be so in every case where the trial court erred in its admission (or rejection) of evidence or where a jury was not properly instructed because commenting on the credibility of a witness is no more or less crucial to the jury than for example prohibiting a piece of evidence for jury consideration. Hicks is equating right to a trial by jury with right to properly conducted trial by jury.

None of the cases cited by the Petitioner deal with the Seventh Amendment as it relates to the propriety of a trial judge commenting or making his opinion known as to the credibility of a witness.

Bollenback v. United States, 326 U.S. 607 (1946) deals with the administration of criminal justice and in particular the effect of an erroneous statement of law to the jury.

In Glasser v. United States, 315 U.S. 60 (1942) the Court approved the trial court's interrogation of witnesses and ruled that "[t]he extent of such examination rests in the sound discretion of the trial court." At p. 83.

Quercia v. United States, 289 U.S. 466 (1933) deals with the question of a trial court's comments on credibility but the Seventh Amendment is not mentioned.

There is no compelling or important reason to review this garden-variety personal injury case. The law is well settled that a trial judge's power to examine witnesses is a discretionary

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2 Query whether this action is one of "common law." See Crowell v. Benson, 285 U.S. 22 (1932).

one, 10 J. Moore, Moore's Federal Practice, Sec. 614.02 (2d Ed. 1982), and a reversal by this Court would give little guidance to trial and appellate courts. The problems involved vary widely from case to case. Only if this Court wishes to set a standard different from "discretion" would this case warrant certiorari.

Besides, what the trial judge did here was perfectly proper.

Hicks' sole complaint is the questioning by the court of certain "witnesses." They are not named as such but obviously they are Drs. Ford and Williams.

No particular question nor line of questions are quoted as being improper as far as Dr. Ford is concerned. Hicks' real complaint is that District Judge Doumar obviously did not believe this doctor. In view of his preposterous testimony, it is not surprising. Nevertheless, plaintiff's counsel never moved for a mistrial, nor did he request the jury be instructed or cautioned in any respect. Indeed, after Judge Doumar stated how he intended to resolve counsel's concerns, Mr. Radin agreed the problem was "cleared up." (266T). Thus, not only was a proper objection not made as required by F.R.E. 614(c), but moreover the plaintiff is now estopped from claiming the trial court erred.

The complaint concerning the court's questioning of Dr. Williams is based on the following questions:

> "THE COURT: Now, Doctor, in relation to post-concussion syndrome, is it that your headaches or pains are greater after the accident and then diminish?
>
> "WITNESS: That's --
>
> "THE COURT: Is that correct?
>
> "THE WITNESS: That's typical, yes.
>
> "THE COURT: It wouldn't be that they were so insignificant at the beginning and later increase later on several months later; is that correct?
>
> "THE WITNESS: That's correct."

The question is improper, Hicks argues, because it assumed Hicks' headaches were initially "insignificant." But there was ample evidence that Hicks' headaches were indeed "insignificant" at the outset and later became a problem.

Hicks' wife testified that his headaches were not as bad when he first came home and became worse as time went on. (311T-312T). Moreover she testified that in October, shortly after the fall when he was still on the vessel, his headaches were not as bad as they were when he later got home. (327T).

When at trial plaintiff was asked whether he mentioned his headaches to the vessel's Mate when he first got medical attention ashore in New Jersey, he said:

> "A. No I told him (mate) at that time that I wanted to see the doctor about my legs because they was still bothering me.
>
> . . .
>
> "Q. Was your head bothering you.
>
> "A. I was having the headaches, but I thought I was going to get all right, and mainly my concern at that time was my leg problems." (126T).
>
> "Q. You went to the doctor in Cherry Hill, New Jersey?
>
> "A. Yes.
>
> "Q. You didn't tell him a thing about your head, did you?
>
> "A. At that time my legs was what was really bothering me. That's why I went to the Public Health there. My head eased off a while. I had been taking different medications the mate had given me, and I was still continuing to try to work." (170T).

Another fact pointing to insignificant headaches at the outset is the testimony of the plaintiff admitting he did not even tell the Cherry Hill doctors about his alleged fall. (176T-178T).

And finally when he first got Public Health treatment in Norfolk after he left the vessel on November 12 and 20, a month after his fall, he did not mention anything about his head. (188T).

The above notwithstanding, the court realized it was getting close to the line and instructed the jury as follows after Dr. Williams' testimony:

> "The Court further wants to advise the jury that nothing the Court may say or do during the course of the trial is intended to indicate nor should be taken as indicating what your verdict should be. It is your verdict, and you are to decide the facts, not

what the Court may think or whatever you think the Court should think.

"The Court will instruct you as to the law and you decide the facts."

Any possible prejudice was effectively eliminated by this curative instruction. United States v. Billups, 692 F.2d 320 (4th Cir. 1982); see United States v. Berardelli, 565 F.2d 24, 30 (2nd Cir. 1977).

Rule 614 of the Federal Rules of Evidence states as follows:

"(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to the interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule (b) does not incorporate its own standard and thus we must turn to case law. See United States v. Kidding, 560 F.2d 1303 (7th Cir. 1977), cert. denied, 434 U.S. 872 (1977).

A review of applicable circuit courts of appeal decisions[3] reveals that the test is whether the court has assumed the role of an advocate. The function of trial judge is not to sit idly by

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3 United States v. Karnes, 531 F.2d 214 (4th Cir. 1976); United States v. Ostendorff, 371 F.2d 729 (4th Cir. 1967) cert. denied, 386 U.S. 982 (1967); United States v. Cole, 491 F.2d 1276 (4th Cir. 1974); Simon V. United States, 123 F.2d 80 (1941) cert. denied, 314 U.S. 694 (1941).

In the Fifth Circuit a new trial is awarded when there has been a "...blatant intrusion by the judge in the trial of [the] case which would lead to a fundamental miscarriage of justice." Mitchell v. M.D. Anderson Hospital, 679 F.2d 88, 92 (5th Cir. 1982).

In the Eighth Circuit a new trial is awarded only when "...the questions asked by the court were intended to suggest in any way or manner what verdict the jury shall find." United States v. Harris, 546 F.2d 234, 238 (8th Cir. 1976).

when he feels important points have not been fully developed. Here an important issue was whether Hicks' symptomatology was consistent with post-concussion syndrome. Because both counsel were apprehensive of what stringent cross-examination of the opposing doctor might bring out, there were questions left that needed to be asked.

> "...[A] federal district judge...is not a bump on a log, nor even a referee in a prizefight. He has not only the right, but he has the duty to participate in the examination of witnesses when necessary to bring out matters that have been insufficiently developed by counsel." United States v. Ostendorff, supra, at 732.
>
> "It cannot be too often repeated, or too strongly emphasised, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting, He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such a way as to be understood by the jury, as well as by himself."
>
> "...[A]nd it is no ground of complaint that the facts so developed may hurt or help one side or the other." Simon v. United States, supra at 83.

The most that can be said here is that the court's questioning of the two medical witnesses gave the jury a clearer view of their conflicting opinion as to the nature of post-traumatic syndrome. At no point did the court, in front of the jury, express its opinion of the credibility of any of the witnesses.

MOTION FOR COSTS

The test under Rule 49.2 is whether or not the certiorari application is "frivolous." Frivolous is defined by Webster's New World Dictionary (Second College Edition, 1974) as "of little value or importance; trifling; trivial."

As reflected by the brief in opposition, the Petition is of little value and is trivial. The Fourth Circuit obviously thought so in view of its short per curiam decision. (1a - 3a).

No serious attempt has been made to fit the Petition for

Certiorari grounds within Rule 17. The fragile effort to characterize the issue as one of Constitutional importance is "trifling" and furthermore was never raised below. No explanation is given as to how a ruling by this Court in this case would further the administration of fairness and justice in the courtroom.

Apex, the Respondent, has been put to the expense of legal fees for preparation of its brief in opposition and has thus suffered damages. No remedy exists for restitution of the expense, already substantial, for defense in the courts below, but Rule 49.2 does provide relief for the expense incurred in this Court. Accord, Tatum v. Regents of Nebraska - Lincoln (82-6145), 51 LW 3883 (1983).

Attached hereto marked Exhibit A is an affidavit substantiating the fee charged.

THEREFORE, the Respondent prays for damages of $750 for attorneys fees in addition to normal taxable costs.

CONCLUSION

The Respondent prays that the Petition for a Writ of Certiorari be denied, and that it be awarded damages and costs.

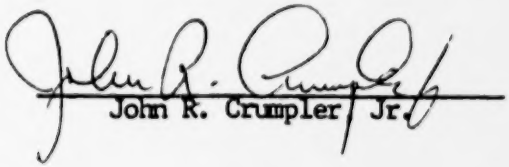
John R. Crumpler, Jr.
Counsel for Respondent

STATEMENT REQUIRED BY RULE 28:1

Respondent Apex Marine Corporation is a wholly owned subsidiary of Apex Resources, Inc., a privately held Delaware corporation.

CERTIFICATE OF SERVICE

I, John R. Crumpler, Jr., certify that on July 22, 1983, forty (40) copies of this Brief in Opposition were mailed to the Clerk of the United States Supreme Court, and three (3) copies were mailed or delivered to Melvin J. Radin, Esq., Suite 500, Holiday Inn Scope, Norfolk, Virginia 23510.



John R. Crumpler, Jr.

EXHIBIT A

AFFIDAVIT

I hereby swear that the legal fee charged to Apex Marine Corporation for preparation of the Respondent's Brief in Opposition is $750.

John R. Crumpler, Jr.

Subscribed and sworn to before me at Norfolk, Virginia, this 20th day of July, 1983.

Lucy R. Watters
Notary Public

My Commission Expires: May 13, 1986